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Defamation -- Damages -- Requirements for Collection of Substantial Damages in Actionable Per Se Defamation

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tion).[37] *Ethridge* seems to extend this line of cases to (at least some) payments made under state contracts. Together *Ethridge* and the earlier line of cases seem to be consistent with a new principle. Substantial state payments to a discriminating private organization make the discriminatory acts of the private organization "state action."[38]

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Defamation—Damages—Requirements for Collection of Substantial Damages in Actionable Per Se Defamation

In *R.H. Bouligny, Inc. v. United Steelworkers*,[1] a defamation action arising out of a labor organization campaign, the North Carolina Supreme Court stated the following rule in regard to damages recoverable for a defamatory statement adjudged actionable per se:[2]

[37] *See, e.g.*, Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963).

[38] *Compare* Griffin v. Bd. of Supervisors, 339 F.2d 486 (4th Cir. 1964) *with* Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) *and* Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

[1] 270 N.C. 160, 154 S.E.2d 344 (1967). For the complete text of the defendant's five further answers and defenses and the various motions, demurrers and rulings that gave rise to its appeal, see *id.* at 163-66, 154 S.E.2d at 349-51. The basic issues raised concern questions of qualified privilege in labor organization campaign communications, federal preemption of labor defamation actions under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1964), and the Labor Management Relations Act, 29 U.S.C. §§ 141-87 (1964), state jurisdiction to award damages for labor dispute defamation under the first and fourteenth amendments to the United States Constitution, and whether plaintiff's damages allegations were sufficient to state a cause of action. The court held in favor of the plaintiff on all questions but that of privilege, ruling on that point that the defense of qualified privilege does extend to defamatory statements made during labor organization campaigns.

[2] Defamation considered sufficient to establish a cause of action without proof of specific monetary loss, i.e., special damages, is referred to as actionable per se. Slander is generally not actionable per se unless it imputes commission of a crime, a loathsome disease, unchastity to a woman, or tends to affect the plaintiff in his trade or profession. W. PROSSER, LAW OF TORTS 772 (3d ed. 1964). Under the common law, all libel was considered actionable per se. However, confusion has arisen in this country over the division of libel into two types—libel per se and libel per quod. In some states, libel per se—or libel defamatory on its face—maintains its actionable per se character, although libel per quod—that requiring the introduction of extrinsic evidence to establish its defamatory nature—is not considered actionable without proof of special damages. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966); Eldridge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966). The North Carolina courts have not escaped this confusion. *See* Kindley v. Privette, 241 N.C. 140, 84 S.E.2d

> [E]ven though the alleged statements were published by the defendant, were not privileged, were false and had a natural and immediate tendency to impair the plaintiff's repuation in the area of its customer or employee relations, *the plaintiff can recover, under the law of this State, as compensatory damages, only a nominal amount in absence of proof of both the fact and the extent of damages actually suffered by it as a result of the publications.*[3]

Although the statement is dictum, it represents a change in defamation law. Most jurisdictions hold that general damages[4] are presumed as a natural consequence of actionable per se defamation, thus establishing a cause of action and insuring at least a verdict for the plaintiff.[5] Further, the plaintiff who fails to plead or prove some actual injury resulting from the defamation is not automatically limited to a nominal recovery; substantial damages may be awarded based solely on the presumption.[6] North Carolina, at least

660 (1954) (all libel actionable per se). *Contra,* Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938) (libel per quod requires proof of special damages to be actionable). The conflicting language used in both *Flake* and *Kindley* is quoted with apparent approval in *Bouligny.* R.H. Bouligny, Inc., v. United Steelworkers, 270 N.C. 160, 168-69, 154 S.E.2d 344, 353 (1967). The libel per se—libel per quod confusion in this state is not within the scope of this note. For a full discussion of this problem, see *Torts, Fourth Annual Survey of North Carolina Case Law,* 35 N.C.L. REV. 177, 256 (1957); 33 N.C.L. REV. 674 (1955).

[3] R.H. Bouligny, Inc. v. United Steelworkers, 270 N.C. 160, 170, 154 S.E.2d 344, 353-54 (1967) (emphasis added). Although discussed, the question of proof required in order to collect more than nominal damages, a cause of action having been established, was not directly submitted to the court.

[4] The elements of general damages include injury to reputation, physical pain and inconvenience, humiliation, embarrassment and mental suffering. Payne v. Thomas, 176 N.C. 401, 97 S.E. 212 (1918); Osborne v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

[5] Starks v. Comer, 190 Ala. 245, 67 So. 440 (1914); Stidham v. Wachtel, 41 Del. 327, 21 A.2d 282 (Super. Ct. 1941); Hermann v. Newark Morning Ledger, 48 N.J. Super. 420, 138 A.2d 61 (Super. Ct. 1958); Badame v. Lampke, 242 N.C. 755, 89 S.E.2d 466 (1955); Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); James v. Powell, 154 Va. 96, 152 S.E. 539 (1930); Arnold v. National Union of Marine Cooks, 44 Wash.2d 183, 265 P.2d 1051 (1954), *aff'd on other grounds,* 348 U.S. 37 (1954); C. MCCORMICK, LAW OF DAMAGES 423 (1935) (hereinafter cited as MCCORMICK); M. NEWELL, SLANDER AND LIBEL 810 (4th ed. 1924).

[6] Holden v. American News Co., 52 F. Supp. 24 (D.D.C. 1943); Starks v. Comer, 190 Ala. 245, 67 So. 440 (1914); Barnett v. McClain, 153 Ark. 325, 240 S.W. 415 (1922); Stidham v. Wachtel, 41 Del. 327, 21 A.2d 282 (Super. Ct. 1941); Walsh v. Trenton Times, 124 N.J.L. 23, 10 A.2d 740 (Ct. Err. & App. 1940); Arnold v. National Union of Marine Cooks, 44 Wash.2d 183, 265 P.2d 1051 (1954); *see* Youssoupoff v. Metro-Goldwyn-

prior to the 1962 opinion cited as authority for Bouligny,[7] has been in accord with this rule.[8] Since then, however, this presumption of damages appears to suffice only to establish a cause of action in those situations where proof of special damages is not required.[9] It no longer will support a recovery of more than a nominal amount.

One possible explanation for the language is that it is influenced by the recent U.S. Supreme Court decision of *Linn v. Plant Guard Workers*.[10] In that case, it was held that the Labor Management Relations Act does not preempt state jurisdiction in libel actions arising out of labor organization campaigns.[11] It was also held that in order to recover the plaintiff must prove that the statements were made with malice and caused some form of harm recognized as compensable under state tort law.[12] As interpreted by *Bouligny*, this *Linn* proof requirement is necessary in order to establish a cause of action.[13] The *Bouligny* dictum under consideration, however, calls for proof of damages in order to collect more than a

Mayer Pictures, Ltd., 50 T.L.R. 581 (C.A. 1934); Tripp v. Thomas, 107 Eng. Rep. 792 (1824); McCORMICK 423; M. NEWELL, *supra* note 10, at 821; 3 RESTATEMENT OF TORTS § 621, comment *a* (1938); RESTATEMENT OF TORTS, Explanatory Notes § 569, comment *c* at 91 (Tent. Draft No. 11, 1965). Some cases indicate that even if the presumption of damages is controverted, plaintiff is still entitled to a substantial award. *See* Modisette & Adams v. Lorenze, 163 La. 505, 112 So. 397 (1927); Hermann v. Newark Morning Ledger, 48 N.J. Super. 420, 138 A.2d 61 (Super. Ct. 1958); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd. *supra*.

[7] Jones v. Hester, 262 N.C. 487, 137 S.E.2d 846 (1964) (per curiam). Refusing to hold a jury's award of nominal damages invalid, the court stated that a verdict on publication of the libel "entitled the plaintiff to nominal damages. Any further compensatory damages (other than nominal) could be awarded only upon the basis of proof, by the greater weight of the evidence." New trials have been awarded in other jurisdictions due to inadequacy of the verdict. *See, e.g.*, Kehoe v. New York Tribune, Inc., 229 App. Div. 220, 241 N.Y.S. 676 (1930).

[8] Barringer v. Deal, 164 N.C. 246, 80 S.E. 161 (1913); *see* Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1939) (dictum); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1937) (dictum); Brandis & Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C.L. REV. 249, 272 & n.157 (1953).

[9] R.H. Bouligny, Inc., v. United Steelworkers, 270 N.C. 160, 169, 154 S.E.2d 344, 353 (1967).

[10] 383 U.S. 53 (1966).

[11] *Id.* at 61.

[12] *Id.* at 64-65. The *Linn* decision required proof of malice and damages in order to protect labor unions and smaller employers from "the propensity of juries to award excessive damages for defamation," thereby attempting to balance the state's interest in protecting its residents from malicious libel with the "effective administration of national labor policy." *Id.*

[13] R.H. Bouligny, Inc., v. United Steelworkers, 270 N.C. 160, 176, 154 S.E.2d 344, 358 (1967).

nominal award, the cause of action already having been established. Of course, this difference of emphasis between proof allowing judgment and proof allowing substantial recovery does not in itself mean that *Linn* was not the motivation behind the *Bouligny* proof requirement. However, the *Bouligny* language itself is broad, and it was arrived at by the North Carolina court without mention of *Linn*. Indeed, the only case cited as authority for *Bouligny* in this regard was an action involving two individuals.[14] All these factors considered together point to the conclusion that the particular *Bouligny* paragraph in question is not controlled by the *Linn* case. Thus it seems that the language is meant to apply to all libel and slander suits in North Carolina that are deemed actionable without proof of special damages.

Although *Bouligny* calls for proof of the fact and extent of harm before substantial damages will be awarded, there are several possibilities as to the degree of proof that will satisfy this demand. It may be argued that the proof of damages required by *Bouligny* can be satisfied by the presumption of damages arising under the common law. This was the result in a New Jersey case, which held that:

> This requirement that the damages be 'proved' is not necessarily inconsistent with an allowance of general damages by 'presumption.' Such a presumption arises by logical inference from the patently defamatory character of a publication, assisted by the reasoning of experience, and stands as an element of proof which, until overcome by contrary proof, will support a verdict for general damages.[15]

Under such an interpretation, there would be no practical change made by *Bouligny*.

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[14] Jones v. Hester, 262 N.C. 487, 137 S.E.2d 846 (1964).

[15] Bock v. Plainfield Courrier-News, 45 N.J. Super. 302, 312, 132 A.2d 523, 528 (Super. Ct. 1957). The issue arose under the New Jersey Retraction Statute, which provides that if a non-malicious statement has been retracted, the plaintiff "shall recover only his actual damage proved and specifically alleged in the complaint." N.J. STAT. ANN. § 2A: 43-2 (1952). Construction of the North Carolina Retraction Statute has never required consideration of this point, the statute providing only that "plaintiff . . . shall recover only actual damages. . . ." making no mention of the need to prove those damages. N.C. GEN. STAT. § 99-2 (1965). The phrase "actual damages" has been defined as encompassing all but punitive damages, i.e., special damages, physical pain and suffering, mental suffering and injury to reputation. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616 (1927); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

General damages are said to be proved by introduction of evidence tending to show the probable impact of the defamation (as opposed to direct proof of injury).[16] This, then, is another possible interpretation of the degree of proof of harm required by *Bouligny*. Elements admissible as evidence usually include such things as the severity of the language, plaintiff's social and financial standing, the extent of publication of the defamation, and the defendant's influence as measured by his standing in the community.[17] Introduction of such evidence is always advisable in an effort to increase the damages award.[18] To require it would amount to a shift from the realm of "ought to" in an effort to increase the damages award to the realm of "must" in order to qualify for a substantial damages verdict. It would have little practical effect, since such evidence is most often introduced as a matter of course.[19] However, the general intangible nature of reputational injury[20] dictates that the absence of this evidence would not necessarily mean that the plaintiff had gone unharmed.

When the North Carolina court required proof "of both the fact and the extent of damages actually suffered," it could have been imposing a requirement that the plaintiff prove special damages—a specific dollars and cents loss—to collect more than nominal damages. This strict interpretation is arguable in light of the court's holding that a meeting of the *Linn* proof of injury requirements[21] by the plaintiff would be sufficient "to permit recovery of nominal damages."[22] This may mean, by inference, that a stricter proof requirement than that imposed by *Linn* must be met in order to

[16] *See* McCormick § 117.

[17] *Id.* There is conflicting authority over the admissibility of other factors, such as plaintiff's general good reputation (deemed presumed by many courts), evidence of repetition by third persons, specific instances of the effect of the defamation on individual recipients, and defendant's wealth (allowed by most courts only on the issue of punitive damages). *Id.*; Note, *Direct Proof of General Damage by Defamation*, 2 N.Y.L. Rev. 305 (1924); Comment, *Developments in the Law of Defamation*, 69 Harv. L. Rev. 875 (1956).

[18] Brandis & Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C.L. Rev. 249, 272 & n. 157 (1953).

[19] McCormick 423-24.

[20] See note 36 *infra* and accompanying text.

[21] As interpreted by the court in *Bouligny*, the *Linn* case requires proof "that the publications 'injured the relations between the plaintiff and its employees' or damaged 'the good name and reputation' of the plaintiff in the eyes of the employees or prospective employees . . . ." R.H. Bouligny, Inc., v. United Steelworkers, 270 N.C. 160, 178, 154 S.E.2d 344, 359 (1967).

[22] *Id.*

get *more* than nominal damages.[23] Such a stricter requirement would probably mean proof of pecuniary harm.[24] The result would be that compensation for often real but immeasurable harm (in monetary terms) to reputation and feelings would become a rarity in North Carolina defamation law.

The most likely interpretation of *Bouligny*'s proof of damages requirement, judging from the language on its face, is that the plaintiff must provide *direct proof* of both the fact and the extent of injury before qualifying for substantial compensation. For example, the plaintiff must objectively prove that his relationship with friends has been unfavorably influenced, and perhaps the degree of this influence, or how many of his friendships have been so affected. Because of this likelihood, attention should be directed to whether this is a desirable requirement.

In favor of such a requirement is the possibility that it may inject a greater element of control and rationale into defamation damages awards by juries.[25] It would facilitate the jury's understanding of the exact harm that their award should compensate and would make easier the court's review of the jury's award.[26] This same desirable goal could be approached, however, through clearer explanation to the jury of the elements of presumed injury to reputation for which they are to award compensation.[27] The advantage

[23] On the other hand, the phrase "to permit recovery of nominal damages" may be intended to refer only to the establishment of a cause of action, and not to be read as meaning plaintiff can recover *only* nominal damages in the absence of further proof. At best, the language is unclear.

[24] This assumes, of course, that the degree of proof required by *Linn* is interpreted by *Bouligny* as being direct proof of claimed injury. This appears to be the case. See note 21 *supra*.

[25] Amounts of verdicts vary from nominal damages of a few cents to a fortune in six figures, according to numberless factors, such as the age, sex, wealth, and personal attractiveness of the parties, the skill of the respective counsel, the pungency of the defaming words, and the infinite variety of experiences, sympathies, and prejudices of the jurymen.

McCORMICK, *supra* note 10, at 443.

[26] The criteria used by the courts in determining the reasonableness of a damages award is whether it appears to be the result of passion or prejudice. See, *e.g.*, Yates v. Mullins, 233 Ky. 781, 26 S.W.2d 757 (1930).

[27] Comment, *Developments in the Law of Defamation*, 69 HARV. L. REV. 875 (1956). The harms resulting from injury to reputation would consist of such things as pecuniary injury, physical injury, mental suffering, and loss of association.

By focusing directly upon these specific harms to the individual rather than on the injury to reputation which caused them, the arbitrary nature of jury awards of general damages might be somewhat reduced

of such a practice, in lieu of requiring proof of damages, is that it permits compensation for defamatory harm not subject to direct proof. Besides, there is no guarantee that different men would not assign different values to those injuries that were directly proved. Thus the uncertainties in amounts of awards would continue to be a factor under the *Bouligny* proof requirement.

Under the interpretation of *Bouligny* being considered here, those unable to prove directly some harm resulting from defamation still would have the benefit of a verdict in their favor. This fact forces one to consider the vindicatory function of a verdict without damages. Vindication, or restoration of reputation, is probably the relief most desired by victims of defamation. Thus, a verdict without damages (or with only a nominal award) may satisfy the defamed[28] while not burdening the defamer with potentially large damages payments.[29]

> The allowance of nominal damages performs a vindicatory function by enabling the plaintiff to brand the defamatory publication as false. The rule that permits satisfaction of the deep seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes. The judgement also partakes of the nature of relief in equity by subduing, or at least minimizing, the spread of harm to reputation.[30]

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and the courts might be provided with at least a general standard for determining the outer limits of proper awards of damages.

Id. at 936.

[28] Of course, punitive damages may be assessed against a defendant in some libel and slander cases. In North Carolina, such damages can be awarded only if the defamation was perpetrated with actual malice (the implied malice considered to accompany libel or slander per se will not suffice), and the award must bear some reasonable relation to the circumstances. *See, e.g.*, Cotton v. Fisheries Prods. Co., 181 N.C. 151, 106 S.E. 487 (1921). This note deals only with the compensatory damages aspect of actionable per se defamation.

[29] The "lie bill," a form of action apparently once used in some northern Arkansas counties, provided a somewhat similar result. The slandered party would file a "lie bill" against the defamer in a justice of the peace court. If the plaintiff won his case, the verdict took the form of a declaratory judgment in which the defendant was required to sign an admission that he had lied about the plaintiff. See Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423 (1952).

[30] Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (D.C. Cir. 1966). The language was used in rejecting a requirement of proof of special damages to establish a cause of action for libel per quod. However, the court indicated that (similar to *Bouligny*) it would require proof of injury before allowing more than a nominal award: "[A] plaintiff need not show any pecuniary damage in order to establish the libel *and recover nominal*

Closer scrutiny, however, reveals several practical considerations which tend to limit the effectiveness of these vindicatory functions of a nominal damages verdict. First, a nominal award may indicate to the general public that the plaintiff's damaged honor and reputation have been assessed at a similar small value.[31] As put by one English adjudicator, "[T]he damages awarded have to be regarded as the demonstrative mark of vindication."[32]

Further, any idea that the spread of harm to reputation will be minimized by a judgment must be considered in light of the speed—or lack of it—with which verdicts are rendered. Crowded court calendars and complex issues combine to make judicial vindication painfully slow.[33] At the same time, harm to reputation and feelings can result in no less time than it takes a newspaper to be published, distributed and read by the public. Indeed, the harm has run its full course and been long ingrained in both recipients and victim before judgment is rendered.

Finally, before any judicial vindication can assert itself, the judicial system must be available to the victim of defamation. One must contend with the prohibitive expense of defamation litigation,[34] and any further limitation of the possibility of making the action pay its own way—i.e., by requiring direct proof of injury before substantial damages may be awarded—may effectively close the court's doors to less wealthy plaintiffs.

The vindicatory value of a verdict without substantial damages is thus open to question. Compensation for injury from defamation is probably the primary value of an action for damages. A requirement of direct proof of injury before the victim can collect substan-

damages, or compensation for non-pecuniary damage supported by the proof." Id. at 659 (emphasis added).

[31] "The very nature of an action which prays for damages, in a society where economic values dominate, implies failure in the action if substantial damages be not awarded." Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 428 (1952). "Thus a libel impugning the virtue of the village banker's daughter that results in a verdict for six cents implies that her repuation for chastity was worth only that much." Donelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 873 (1948).

[32] Dingle v. Associated Newspapers Ltd., [1960] 3 W.L.R. 229, 240 (H.L.), cited in Note, *Problems of Assessing Damages for Defamation*, 79 L.Q. REV. 63, 64 (1963).

[33] Comment, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1732 (1967).

[34] Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 604 (1964).

tial damages limits the compensatory function of a defamation action since direct proof of specific injury caused by defamation is often difficult if not impossible.[35]

> By the very nature of the harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle. The door of opportunity may be closed to the victim without his knowledge, his business or professional career limited by the operation of forces which he cannot identify but which, nonetheless, were set in motion by the defamatory statements.[36]

In light of these considerations—an uncertain and perhaps unnecessary method of regulating jury determinations, the questionable vindicatory value of a judicial verdict without damages, and the inherent difficulty of the proof required—it seems more desirable to permit the award of substantial compensation for defamatory harm based on a presumption of damages. Maintenance of the full scope of this presumption, coupled with more thorough instructions to juries and a greater readiness to review their damages awards, is a preferable alternative to the requirement of direct proof of damage to qualify for substantial award—which seems to be the most probable effect of *Bouligny*. This alternative permits compensation for unprovable but present harm, and also offers greater protection from unreasonable damages awards.

Finally, it must be admitted that it remains basically unclear exactly what the *Bouligny* dictum intends to require of a plaintiff seeking compensation for damages resulting from actionable per se defamation. This added uncertainty as to what he must do to gain substantial compensation for defamatory harm should be clarified at the court's earliest opportunity.

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Estate Tax—Deductions—Life Beneficiary with Power to Invade Corpus of Charitable Remainder

The Internal Revenue code of 1954 provides that in the determination of the taxable estate the value of all transfers, bequest, legacies, or devises of property to certain public, charitable, or

[35] Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (D.C. Cir. 1966); RESTATEMENT OF TORTS § 621, comment *a* (1938).

[36] 1 F. HARPER & F. JAMES, THE LAW OF TORTS 468 (1956).